

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Facilitating the Provision of Spectrum- |) | WT Docket No. 02-381 |
| Based Services to Rural Areas and |) | |
| Promoting Opportunities for Rural |) | |
| Telephone Companies To Provide |) | |
| Spectrum-Based Services |) | |
| |) | |
| 2000 Biennial Regulatory Review |) | WT Docket No. 01-14 |
| Spectrum Aggregation Limits For |) | |
| Commercial Mobile Radio Services |) | |
| |) | |
| Increasing Flexibility To Promote |) | WT Docket No. 03-202 |
| Access to and the Efficient and |) | |
| Intensive Use of Spectrum and the |) | |
| Widespread Deployment of Wireless |) | |
| Services, and To Facilitate Capital |) | |
| Formation |) | |

**REPLY COMMENTS OF
CTIA – THE WIRELESS ASSOCIATION™**

CTIA – The Wireless Association™ (“CTIA”) hereby submits its reply to the initial comments filed in response to the Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above-captioned proceeding.¹ CTIA reiterates its opposition to each of the pending proposals: a “keep what you use” spectrum take-back rule, renewal term performance requirements, and involuntary spectrum easements. Adoption of these proposals would be counterproductive to the Commission’s goal of encouraging the deployment of wireless services in rural areas.

¹ See *In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket Nos. 02-381, 01-14, and 03-202, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078 (2004)(“*Further Notice*”).

Nine parties filed initial comments in response to the *Further Notice*. Of these, six commenters, including CTIA, strongly objected to the non-market-oriented, command-and-control “keep what you use” proposal.² These commenters provided specific factual evidence to demonstrate, among other things, that (1) under the current market-oriented rules wireless carriers continue to expand into rural areas,³ and (2) the Commission’s partitioning, disaggregation, and spectrum leasing rules are working effectively to facilitate access to spectrum in rural areas.⁴ In contrast, the three commenters that support the “keep what you use” proposal rely only on anecdotal stories, conjecture, and invalid assumptions.⁵ Notably, all commenters opposed the renewal term performance requirement and involuntary easement proposals.

I. The Record Demonstrates that the Current Market-Oriented Spectrum Policies Are Fostering the Delivery of Wireless Services To Rural Areas

In their initial comments, CTIA and others described how the Commission’s light-handed, market-oriented regulation of wireless services has been a huge success, spurring enormous investment in wireless facilities and the build-out of advanced voice and data networks to all parts of the United States, including rural areas. These commenters described how market forces, not regulation, provide the most effective incentive for carriers to expand their coverage and introduce the latest technological developments into rural areas.⁶ They also explained that wireless carriers’ access to capital is dependent upon the financial industry’s confidence in the

² The six commenters that filed comments opposing the Commission’s proposals are CTIA, Cingular Wireless LLC (“Cingular”), Dobson Communications Corporation (“Dobson”), Nextel Partners, Inc. (“Nextel Partners”), Sprint Corporation (“Sprint”), T-Mobile USA, Inc. (“T-Mobile”).

³ See Comments of CTIA at 5; Comments of Cingular at 3; Comments of Dobson at 2-3 and 6-7; Comments of Nextel Partners at 2-3; Comments of Sprint at 2-3; Comments of T-Mobile at 2-6.

⁴ See Comments of CTIA at 7-10; Comments of Cingular at 7; Comments of Dobson at 8-11; Comments of Nextel Partners at 5-7; Comments of Sprint at 5-6; Comments of T-Mobile at 3-4.

⁵ The three parties that filed comments supporting adoption of “keep what you use” spectrum take-backs are the Rural Telecommunications Group (“RTG”), Rural Cellular Association (“RCA”), and the National Telecommunications Cooperative Association (“NTCA”).

⁶ See Comments of CTIA at 5; Comments of Cingular at 3, Comments of Dobson at 2-3 and 6-7, Comments of Nextel Partners at 2-3, Comments of Sprint at 2-3, Comments of T-Mobile at 2-6.

stability of FCC rules governing the retention and renewal of wireless licenses.⁷ No party disputed CTIA's assertion that *access to capital* is a greater constraint to further wireless deployment in rural areas than is *access to spectrum*.

II. Proponents of “Keep What You Use” Rely Only on Conjecture, Generalized Anecdotes and Invalid Assumptions

The Rural Cellular Association (“RCA”), the Rural Telecommunications Group (“RTG”), and the National Telecommunications Cooperative Association (“NTCA”) each support the “keep what you use proposal,”⁸ but their comments rely solely on anecdotal stories, unsupported conjecture and invalid assumptions.

A. In Contrast to the Proponents’ Unsubstantiated Claims, the Commission’s Partitioning, Disaggregation, and Spectrum Leasing Policies are Making Spectrum Available in Rural Areas

NTCA and RTG claim that “large carriers” are unwilling to engage in secondary market transactions with their members.⁹ RCA and NTCA both complain that “large carriers” add unwarranted complexity to such transactions during their negotiations.¹⁰ None of the comments provide evidentiary support.

In contrast, the record contains ample and specific evidence that the Commission’s partitioning, disaggregation and spectrum leasing rules are being used extensively and constitute effective mechanisms for developing service in rural areas. CTIA, for example, showed that as a result of geographic partitioning and spectrum disaggregation an additional 370 A and B block PCS licenses, 249 cellular licenses, and 176 D, E, and F Block BTA-based licenses have been

⁷ See Comments of CTIA at 4 and 15; Comments of Cingular at 6; Comments of Dobson at 10-11; Comments of Nextel Partners at 18; Comments of Sprint at 13-14; Comments of T-Mobile at 7-8.

⁸ See Comments of RTG; Comments of NTCA; Comments of RCA.

⁹ See Comments of NTCA at 3; Comments of RTG at 7-8.

¹⁰ See Comments of RCA at 3; Comments of NTCA at 3. Dobson, however, explains that negotiations are an inherent part of the competitive marketplace. See Comments of Dobson at 8.

created.¹¹ Cingular stated that, through its affiliates and subsidiaries, it has entered into partitioning and disaggregation agreements covering “hundreds of rural counties.”¹² Dobson, a provider of commercial wireless services that focuses on serving rural communities, stated that it has acquired approximately fifteen PCS licenses through either partitioning and/or disaggregation arrangements over time.¹³ Dobson explains how its partitioned and disaggregated licenses have allowed it to focus its resources on smaller geographic areas that it deems to be economically viable.¹⁴

The initial comments also demonstrate that, although still in their infancy, the Commission’s new spectrum leasing policies have provided carriers with access to underutilized spectrum in rural areas. As CTIA observed, since the secondary markets rules went into effect in early 2004, 15 Broadband PCS spectrum manager lease notifications have been accepted by the Commission, and 13 broadband PCS, 7 cellular and 39 ESMR-related de facto transfer lease applications have been granted as well.¹⁵ Nextel Partners also characterized complaints about spectrum leasing as “disingenuous” because Nextel Partners has not been approached by any rural wireless provider during the past year to lease spectrum.¹⁶ T-Mobile points out that NTCA and RTG are on record as supporting spectrum leasing as a means to facilitate the use of spectrum in unserved and underserved areas.¹⁷

¹¹ See Comments of CTIA at 8-9.

¹² Comments of Cingular at 7.

¹³ See Comments of Dobson at 9.

¹⁴ *Id.*

¹⁵ See Comments of CTIA at 9-10.

¹⁶ See Comments of Nextel Partners at 16.

¹⁷ See Comments of T-Mobile at 3, n.6, citing *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20621-22, and n.72.

B. Contrary to the Proponents' Claims, "Keep What You Use" is not a "Simple Approach" with "Minimal Regulatory Obligations"

Under the Commission's "keep what you use" proposal, a geographic licensee that does not sufficiently "use" spectrum in a given geographic area would be stripped of its license to serve the area. The Commission acknowledges that it has not determined what would be considered sufficient "use" to avoid potential forfeiture.¹⁸ RCA claims that "keep what you use" is a "simple approach" with "minimal" regulatory obligations.¹⁹ In contradiction to its own statement, RCA then suggests that sufficient "use" be determined on a service-by-service basis, a process that not only would require multiple rulemaking proceedings but could lead to inconsistent standards for different CMRS frequency bands.

The difficulty of establishing reasonable standards for taking "unused" spectrum is further illustrated in the comments of NTCA, which already is proposing an exemption to "keep what you use" intended for its own members by limiting the policy's application only to licenses covering "large" geographic areas.²⁰ NTCA also suggests that the Commission undertake an extensive analysis of when to take back spectrum by examining "market forces, including demand and the availability of technology to use the spectrum, and the properties of the spectrum itself."²¹ This vague standard not only would require many additional proceedings to cover, but as applied it likely would stimulate litigation concerning each license proposed for forfeiture. Ultimately, such litigation will delay – not speed – service to rural consumers and will drive up the cost of such service.

¹⁸ See *Further Notice*, 19 FCC Rcd at 19159.

¹⁹ See Comments of RCA at 4.

²⁰ See Comments of NTCA at 4 and n.5.

²¹ *Id.* at 7.

Moreover, “keep what you use” likely will result in the creation of a “patchwork of small, irregularly sized, and minimally valuable pockets of unserved areas.”²² Indeed, the Commission previously has rejected an RCA proposal in another proceeding that would allow auction winners to give back parts of their licensed areas for credit because the Commission determined that such a policy would create licenses for geographic areas that are not optimal in size and, thus, “would decrease the likelihood that [a prospective] new licensee would be able to develop innovative services that will allow it to compete in the marketplace.”²³

Contrary to RCA’s unsubstantiated claim that “keep what you use” worked well in the deployment of the cellular radiotelephone service,²⁴ several commenters pointed out specific and concrete flaws that plagued that process and should not be extended to other wireless services.²⁵

C. Despite the Proponents’ Promises, a “Keep What You Use” Policy Will not Guarantee that Spectrum Will be Put to Use

RTG claims that implementing “keep what you use” rules will “ensure” that fallow spectrum “will actually be utilized by a carrier prepared to immediately deploy much-needed wireless services to rural and unserved areas.”²⁶ On its face, this claim is plainly wrong. Taking away spectrum from each of multiple PCS, ESMR and AWS licensees will not necessarily result in any new carrier putting that spectrum into use. In fact, as noted previously, timely deployment by a new licensee will be unusual because of the inevitable litigation that will accompany a Commission attempt to take spectrum from a licensee who paid for it at auction and fulfilled the associated build-out requirement.

²² Comments of Cingular Wireless, LLC, WT Docket No. 01-108 at 24 (filed July 2, 2001).

²³ *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25216 (2003).

²⁴ See Comments of RCA at 4.

²⁵ See Comments of CTIA at 11-13, *citing* Comments of Cingular Wireless LLC, WT Docket No. 01-108, at 24 (filed July 2, 2001); Comments of Dobson at 13-14.

²⁶ Comments of RTG at 4. RCA is more realistic by acknowledging that there is no assurance that a second licensee will build out a system. See Comments of RCA at 6.

In contrast to RTG's contentions, Cingular points out the fact that, even though the cellular radiotelephone service was subject to "keep what you use" regulation, re-licensing did not guarantee deployment of service as many cellular unserved areas still exist.²⁷ Similarly, the results of past FCC wireless auctions show that numerous licenses received no bids.²⁸ CTIA is also aware of dozens of circumstances in which licensees entered into partitioning and disaggregation agreements with rural LECS – but the LECs ultimately decided not to build out.²⁹ This evidence supports the Commission's conclusion that even where access to spectrum is clearly available carriers will provide service only in geographic areas where there is an economic incentive to do so.³⁰

D. The Proponents Unreasonably Assume that Capital Markets Will Continue to Support Wireless Carriers Even in the Face of the Regulatory Uncertainty of "Keep What You Use"

Each of the commenters opposed to the "keep what you use" proposal discussed how imposing the policy on existing licenses acquired at auction would produce regulatory uncertainty and may undermine investors' confidence in the industry.³¹ It is noteworthy that none of the "keep what you use" proponents addresses its potential effect on licensees' access to capital. This is surprising because, as T-Mobile pointed out, NTCA's own survey identified access to capital as the greatest obstacle incumbent rural carriers face in providing new

²⁷ See Comments of Cingular at 5.

²⁸ See, e.g., results of FCC Auction No. 22, available at <http://wireless.fcc.gov/auctions/22/charts/22market.xls> (visited Feb. 14, 2005) (no high bidder for 13% of licenses auctioned); FCC Auction No. 26, available at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=26 (visited Feb. 14, 2005) (no high bidder for 61% of licenses auctioned).

²⁹ For example, FCC license records for partitioned Broadband PCS Station Licenses WPOH995 (Blair Telephone Company), WPOH996 (Southeast Nebraska Telephone Company) and WPOI223 (Hooper Telephone Company) demonstrate that each partitioned license was cancelled for failure to meet applicable construction requirements. See FCC's Universal Licensing System available at <http://wireless.fcc.gov/uls/> (visited Feb. 14, 2005); see also, e.g., Letter from Mike Ferrante, Wireless Telecommunications Bureau, to Blair Telephone Company (June 18, 2002) (setting aside grant of license cancellation request since license automatically terminated for failure to meet applicable FCC construction requirement under 47 C.F.R. § 24.203).

³⁰ See *Further Notice*, 19 FCC Rcd at 19146.

³¹ See Comments of CTIA at 3-4, 15-16; Comments of Cingular at 7; Comments of Dobson at 10-11; Comments of Nextel Partners at 17-21; Comments of Sprint at 11-14; Comments of T-Mobile at 6-8.

services.³² Unlike RCA, RTG and NTCA, however, the Commission has a statutory duty to engage in reasoned decision-making and cannot ignore the effect that “keep what you use” will have on licensees’ access to capital.³³

In sum, the proponents of “keep what you use” completely ignore a significant issue – the effect regulatory uncertainty has on licensees’ access to capital – while their other arguments rely on unsupported conjecture or generalized anecdotal stories. The record does not support adoption of “keep what you use.”

III. The Commenters are Unanimous in Opposition to the Commission’s Other Proposals -- Performance Renewal Standards And Spectrum Easements

The Commission’s proposal to establish a renewal term performance requirement received no support. Each of the comments that addressed the proposal, including RCA’s, opposed it.³⁴ In the absence of any record support, the proposal for a renewal term performance requirement also should be rejected.

Similarly, the Commission’s proposals to establish spectrum easements or overlays received absolutely no support. The proposal was strongly opposed³⁵ or not addressed.³⁶ Without record support, these proposals should be rejected summarily.

IV. The Commission Should Take Actions That Provide Economic Incentives for Carriers to Serve High-Cost, Sparsely Populated Areas

Some commenters explained how the proposed “keep what you use” spectrum take-back rule would be a draconian response to a problem that does not exist – namely, some industry

³² See Comments of T-Mobile at 7, *citing* National Telecommunications Cooperative Association, *NTCA 2003 Wireless Survey Report* at 9 (Dec. 2003).

³³ See Comments of T-Mobile at 6-7.

³⁴ See Comments of CTIA at 16; Cingular at 8-9; Comments of Dobson at ii; Comments of Nextel Partners at 21-23; Comments of Sprint at 6-9; Comments of T-Mobile at 8-10; Comments of RCA at 7-8.

³⁵ See Comments of CTIA at 16-17; Comments of Cingular at 9-16; Comments of Dobson at ii; Comments of T-Mobile at 10.

³⁶ See Comments of RTG; Comments of RCA; Comments of NTCA.

associations' claimed lack of access to spectrum in rural areas.³⁷ Carriers, in fact, may obtain spectrum in rural areas through multiple means, including initial licensing, assignments, partitioning, disaggregation, spectrum leases, or one of the upcoming license auctions.

The Commission could better encourage service to more rural areas by establishing policies that would reduce infrastructure and financing costs and would provide additional incentives for wireless deployment. The initial comments included many proposals that deserve expedited Commission consideration, including the following:

- The Commission should work with the States to reduce the length of time for approval of eligible telecommunication carrier ("ETC") status for wireless carriers and ensure that wireless carriers continue to have non-discriminatory access to universal service fund ("USF") support.³⁸
- The Commission should adopt CTIA's proposal to modify the base station power limits in Parts 24 and 27 of the Commission's rules by supplementing current limits with ones based on power spectral density.³⁹
- The Commission should address state and local regulations that often unreasonably hinder, or even prevent, the provision of service in rural areas.⁴⁰
- The Commission should work with the U.S. Department of Agriculture to expand the availability of Rural Utilities Services ("RUS") financing.⁴¹

³⁷ See Comments of CTIA at 4, 10-11; Comments of Cingular at 3.

³⁸ See Comments of CTIA at 3, 5-6; Comments of Dobson at 17-18; Comments of T-Mobile at 12.

³⁹ See Comments of CTIA at 11 and n.32, *citing* Letter from Paul Garnett, Director, Regulatory Policy, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-264 (filed Oct. 20, 2004).

⁴⁰ See Comments of T-Mobile at 12.

⁴¹ See Comments of Nextel Partners at 7-14.

V. Conclusion

For the foregoing reasons, CTIA urges the Commission to reject each of the pending proposals for rulemaking. The Commission instead should explore the alternatives addressed in the comments of CTIA and other commenters that would better promote the further deployment of high-quality, affordable services in rural areas.

Respectfully submitted,

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